IP NEWSLETTER

Information and Privacy Commissioner / Ontario

Vol. 3 Issue 3 Summer 1990

COMMISSIONER'S MESSAGE

As I leave the Office of the Information and Privacy Commissioner to take up a new challenge as Chief Judge of the Provincial Court, Criminal Division, I would like to use this opportunity to share some reflections on freedom of information and protection of privacy in Ontario after 2 1/2 years.

As I look back over the past 2 1/2 years, I am impressed at the number of issues that have been dealt with by the agency in orders and recommendations. The agency has made a considerable contribution to jurisprudence in this area. We have dealt with many difficult issues, including fees, personal information, solicitor-client privilege and trade secrets. The orders that have been issued have formed a substantial body of precedent, useful for this agency and other agencies in this country and elsewhere.

In terms of our privacy mandate, we have been actively involved in a number of issues. The agency has released **Guidelines on Facsimile Transmission Security**, a set of proposals for the use of facsimiles in provincial government offices; and **HIV/AIDS in the Workplace**, a set of privacy principles for employers and employees dealing with the sensitive issue of HIV/AIDS in the workplace setting. We have also conducted reviews of records management practices in a number of ministries, and investigations of privacy-related issues when the occasion arose.

In terms of procedures, advancements have been considerable. When the agency began its work, we had nothing but the bare language of the *Freedom of Information and Protection of Privacy Act, 1987* with which to work. We successfully designed an appeals procedure that has been accepted by the community: the government, appellants and lawyers working with the *Act*. I am also gratified at the smooth way in which the process works, particularly with the success of our mediation efforts. More than half of all appeals continue to be settled through the mediation efforts of the appeals staff.

One of the areas where we have made much progress is in the Commissioner's office itself. Just 2 1/2 years old, it is a fully-functioning, mature agency; with systems and structures in place to meet the challenges of dealing with appeals to provincial ministries and agencies. In addition, the right people are in place in the agency -- a good team that makes everything come together.

The agency has a five-year strategic plan in place, both to give a sense of the progress made to date, and to assist the agency in meeting the challenges of the implementation of the municipal legislation. Considerable advances have also been made in technology: each staff member has a computer terminal at his or her desk, and computer systems have been developed to deal with all aspects of the agency's work.

Finally, I leave the agency with a feeling of optimism about the future. The Office of the Information and Privacy Commissioner is ready to meet the challenges of the coming months, including those associated with the 3,000 local government bodies who will be covered by the municipal legislation in January 1991.

The office systems, structure and staff complement are being put in place to meet these new demands, and I have every confidence that positive working relationships will be the result of all these efforts.

Before the provincial legislation became a reality, there was a certain amount of apprehension on the part of both government and the public regarding the potential for misuse -- concerns about excessive secrecy, denial of access and other issues. The reality after 2 1/2 years is a productive relationship between the Office of the Information and Privacy Commissioner and the Freedom of Information and Privacy Branch of Management Board and with the ministries and agencies covered by the *Act*.

These successes lead me to applaud the government for its support of the principles of freedom of information and protection of privacy, and for its continued demonstration of support for the philosophy and principles of the *Freedom of Information and Protection of Privacy Act, 1987*.

Procedural Recommendations: Highlights of Linden's Term

During his 2-1/2 year tenure as Information and Privacy Commissioner, Sidney Linden issued several decisions that defined an institution's procedural obligations in complying with the *Freedom of Information and Protection of Privacy Act, 1987*. Decisions concerning procedural matters have far-reaching implications for the procedural operation of institutions related to the *Act*. This article will highlight significant recommendations which frequently occasion questions.

Records management policies
The Commissioner has frequently emphasized that good record keeping practices are an essential element in the effective implementation of the Act. In Orders 35 and 45, the Commissioner advised institutions to develop clearly-stated guidelines regarding records retention schedules, particularly where the institution adopts practices that go beyond the minimum requirements established by regulation.

Broadly worded requests
In Orders 38 and 99, the Commissioner presented three possible responses an institution could make to broadly-worded requests.

First, it could choose to respond literally to the request and conduct an institution-wide search for the records requested. Second, it could request further information from the requester so it could narrow its area of search. Finally, it could narrow the area of search unilaterally, but if doing so, it should outline the limits of the search to the requester.

Records that may respond to a request
In Order 38 the Commissioner also discussed the institution's obligation to indicate to a requester what records in its custody or control might respond to a request. Unless the institution decides to refuse to confirm or deny the existence of a record, the Commissioner indicated it must in its letter of response advise the requester which records might respond to the request, even if the institution is denying access to those records.

Reviewing records before replying to a request
In Order 81 the Commissioner clarified that an institution must review all records that could respond to a request before responding to the requester within the 30-day time period. This decision addresses a view that the Commissioner found to be incorrect: the *Act* does not require an institution to review records before issuing a response to the requester, and that issuing a fee estimate alone constitutes a response within the 30-day time period.

An institution's interim decision
In cases where records are unduly expensive to produce for review, the Commissioner ruled that the institution may make an interim decision as to access. [An interim decision is one that expresses the institution's views as to what, if any, exemptions probably apply to the record, given its nature. It is not a final decision as to access.]

An institution's interim decision must make the requester aware of what exemptions are likely to apply, and that a final decision as to access has not yet been made. It may be accompanied by a request for at least partial payment of the estimated cost of producing the records. If the requester chooses to pay, the institution must produce the records, review them and make a final decision as to access.

Form of a record
Order 50 dealt with an institution's responsibilities where it receives a request for information that doesn't currently exist in the form it has been requested. The issue was whether the institution was obliged to create a record containing the requested information in the form it had been requested.

In cases where a request is for information in a recorded format different from the format asked for by the requester, the institution is required to advise the requester of what records exist. It is then up to the requester to decide whether or not to obtain these related records, sort through and organize the information into the desired format.

With respect to computer-generated information, when the request relates to information not in the form requested, but reproducible from a machine-readable record, the *Act* requires the institution to create this type of record, "subject to regulations". This means providing the record unless the process of production would unreasonably interfere with the operations of the institution.

Verifying the identity of the individual
In the Commissioner's view, in situations where an institution has agreed to allow an individual access to his or her own personal information, the institution is responsible for verifying the identity of the individual. If the individual personally attends at the institution, there are straightforward ways of providing verification. However, the situation is more difficult if an individual cannot or does not want to pick up the information personally, and insists on receiving the personal information by mail or other means. The Commissioner indicated that institu-

(cont'd)

TABLE OF CONCORDANCE

This Table of Concordance cross references comparable sections in Ontario's *Freedom of Information and Protection of Privacy Act, 1987* with the *Municipal Freedom of Information and Protection of Privacy Act*. The wording of subsections is not always identical.

Provincial Act	Municipal Act
1(a)	1(a)
1(b)	1(b)
2(1)	2(1)
2(2)	2(2)
2(3)	-
2(4)	-
2(5)	3(1),(2),(3)
3	-
4	-
5	-
6	-
7	-
8	-
9	-
10(1)	4(1)
10(2)	4(2)
11(1)	5(1)
11(2)	5(2)
11(3)	5(3)
11(4)	5(4)
-	6(1),(2)
12(1)	-
12(2)	-
13(1)	7(1)
13(2)	7(2)
13(3)	7(3)
14(1)	8(1)
14(2)	8(2)
14(3)	8(3)
14(4)	8(4)
14(5)	8(5)
15	9(1)
-	9(2)
16	-
17(1)	10(1)
17(2)	10(2)
18(1)	11
-	11(h),(i)
18(2)	
19	12
20	13
21(1)	14(1)
21(2)	14(2)
21(3)	14(3)
21(4)	14(4)
21(4)(c)	-
21(5)	14(5)
22	15
23	16
24(1)	17(1)
24(2)	17(2)
24(3)	-
24(4)	-
24(5)	-
-	18(1)
25(1)	18(2)
25(2)	18(3)
25(3)	18(4)
25(4)	18(5)
26	19
27(1)	20(1)
27(2)	20(2)
28(1)	21(1)
28(2)	21(2)
28(3)	21(3)
28(4)	21(4)
28(5)	21(5)
28(6)	21(6)
28(7)	21(7)
28(8)	21(8)
28(9)	21(9)
29(1)	22(1)
-	22(1)(a)(ii)
29(2)	22(2)
29(3)	22(3)
29(4)	22(4)

Provincial Act	Municipal Act
30(1)	23(1)
30(2)	23(2)
30(3)	23(3)
31	24(1)
-	24(2)
32	25
33	-
34(1)	26(1)
34(2)	26(2)
34(2)(c)	-
35	-
36	-
37	27
38(1)	28(1)
38(2)	28(2)
39(1)	29(1)
39(2)	29(2)
39(3)	29(3)(a)
-	29(3)(b)(c)
40(1)	30(1)
40(2)	30(2)
40(3)	30(3)
40(3)(a)(b)	-
40(4)	30(4)
41	31
42	32
42(j)(k)(l)(m)(q)(r)	-
43	33
44 and 45	34(1)
45(h)	-
-	34(1)(e)
-	34(2)
46(1)	35(1)
46(2)	35(2)
46(3)	-
47(1)	36(1)
47(2)	36(2)
48(1)	37(1)
48(2)	37(2)
48(3)	-
48(4)	37(3)
49(a)(b)(c)(d)(f)	38
49(e)	-
50(1)	39(1)
50(2)	39(2)
50(3)	39(3)
50(4)	-
51	40
52	41
53	42
54	43
55	-
56	44
57(1)	45(1)
57(2)	45(3)
-	45(2)
57(3)	45(4)
57(4)	45(5)
57(5)	45(6)
58	-
59	46
60(a)	47(a)
60(b)	-
60(c)	47(b)
60(d)	47(c)
60(e)	47(d)
60(f)	47(e)
60(g)	47(f)
60(h)	47(g)
60(i)	47(h)
60(j)	47(k)
60(k)	47(l)
-	47(i)
-	47(j)
61	48
62(1)	49(1)
62(2)	49(2)
62(3)	-
62(4)	49(3)
63	50
64	51
65(1)	52(2)
65(2)	-
65(3)	-
- 52(3)	
66	53
67	-
68	54
69	-
70	52(1)
71	-
72	55
73	56

Book Review

National Security: Surveillance and Accountability in a Democratic Society
Edited by: Peter Hanks and John D. McCamus

Some of the most difficult access to information and privacy issues arise in the context of the surveillance activities of national security agencies. Given the extraordinary powers normally conferred on such agencies, there is a strong public interest in access to information concerning their work in order to hold such agencies accountable. On the other hand, it is obvious that national security work cannot be effectively conducted in a fish bowl. The need for some level of secrecy in such matters is normally recognized by exemptions for this purpose in access to information and privacy laws. Similarly, on the privacy side, the inherently intrusive nature of surveillance work for national security purposes raises a host of privacy protection concerns. And yet, it is obvious that full protection of the privacy interest is incompatible with effective security work. These issues came to have a prominent place in the Canadian political agenda in the wake of national security scandals arising from the work of the Security Service of the RCMP. As a result of the report of the McDonald Commission, a new security service, CSIS, was established and, as well, an elaborate set of accountability devices were established, including the new Security and Intelligence Review Committee.

These new arrangements are considered at length in a number of the papers collected in this volume which includes contributions by the founding Chair of the review committee, Ronald Atkey, the first director of CSIS, Ted Finn and a useful survey of possible methods of accountability by C.E.S. Franks.

The performance of the Review Committee in its watchdog role is assessed by John McCamus in an introductory survey chapter. As well, the volume includes an interesting series of papers dealing with the question of public access to national security information. Jeff Sallot and Reg Whitaker, both of whom have written extensively on national security issues, offer the perspectives of a journalist and a historian, respectively. The legal aspects of the access question are considered thoroughly by Murray Rankin with particular emphasis placed on the federal Canadian access legislation.

In addition to access and privacy issues, papers are included on questions relating to the legitimacy of the limits typically imposed on disclosure by public servants. A philosopher, Leslie Green, provides an interesting analysis of the limits of the moral claim placed upon public servants by their duty of loyalty and carves out some room for the exercise of a unilateral right to disclose. The "new", "improved" security system of the federal government is exposed to careful scrutiny by Stuart Farson. Kenneth P. Swan in a paper titled, "Whistle-blowing and National Security", offers interesting suggestions with respect to the kinds of mechanisms that might be put in place so as to ensure that public servants who engage in whistle-blowing are not subjected to arbitrary dismissal or other punitive measures.

In addition to the foregoing topics, the volume includes sections on terrorism and on the relationship between the administration of criminal justice and national security matters. As well, the book includes some comparative discussion concerning recent developments in Australia and the United States.

The collection is based on a series of papers first presented at a conference at Osgoode Hall Law School of York University where McCamus is a professor and former Dean and where Hanks, at the time of the the conference, was a visisting professor. The book contains much of interest to readers with an interest in access and privacy issues. More than this, however, the book offers discussion of an interesting range of accountability questions of which access to information forms only a part, albeit an important one. One comes away from a reading of this volume with a strong sense of a remarkable Canadian capacity for institutional innovation and for vigorous ciritical analysis in the attempt to balance the conflicting demands for secrecy and openness in this complex area. The papers are generally well written. The authors bring an interesting mixture of backgrounds and perspectives to their analysis of these intriguing questions.

John Eichmanis

(The book is published by Les Éditions Yvon Blais Inc.)

Highlights (con't)

tions should adopt a flexible approach to such demands, while at the same time taking all reasonable steps to verify the identity of the requester.

Notifying the requester of the head's decision
The Commissioner commented in Order 81 that institutions should not take a narrow interpretation of the notice requirements. The institution has an obligation to fully apprise the requester of the details of the institution's reasons for dealing with the record in a certain manner.

The Section Index of Commissioner's Orders produced regularly by the Freedom of Information and Privacy Branch, Management Board of Cabinet, lists several other procedural recommendations made by Commissioner Sidney Linden, which may be of assistance to institutions when determining their responsibilities under the *Act*.

NEWSLETTER
ISSN 0840-5654

The *Newsletter* is published quarterly by the Office of the Information and Privacy Commissioner.

If you have any comments regarding the *Newsletter*, wish to advise of a change of address or be added to the mailing list, contact:

Monica Zeller, Communications Officer
Information and Privacy Commissioner/ Ontario
80 Bloor Street West, Suite 1700
Toronto, Ontario
M5S 2V1

Telephone: (416) 326-3333
Toll Free: 1-800-387-0073
Fax: (416) 965-2983

Cette publication est également disponible en français.

FREEDOM OF INFORMATION AND PRIVACY TRACKING SYSTEM USERS

The Information and Privacy Commissioner/Ontario is developing a new electronic tracking system which will be available to provincial and municipal Freedom of Information and Privacy Coordinators in November 1990. Based on two years' experience with the current tracking system, substantial revisions are being made.

The new system will be easier to learn and use, and will be flexible enough to meet the individual needs of coordinators. It will produce one standard report for the year-end annual review, but coordinators will also be able to create their own reports. The system's design will be versatile enough so that individual, extra features can be added, with the ability to "archive" request data from previous years and recall it if necessary. Users will be able to transfer data contained in the current system to the new tracking system without needing to re-key the information.

The only requirements necessary to use the new system will be an IBM/PC or 100 per cent compatible machine, a little time and a little patience. The system will be provided at no cost, accompanied by a user's manual. The manual will assist in learning the program and will serve as a reference for problem-solving.

More information will be made available over the course of the summer; and users will be able to request the new system in the fall. If you are interested in receiving additional information, please call the IPC's Systems Branch at (416) 326-3333.

THE THREE YEAR REVIEW

The Standing Committee on the Legislative Assembly has rescheduled its review of the *Freedom of Information and Protection of Privacy Act, 1987* until mid to late September.

Updates and the outcome of the review will be reported in a future issue of the Newsletter when available.